No. 20,770

IN THE

United States Court of Appeals

For the Ninth Circuit

United Shoppers Exclusive, a California corporation; Manfill, Inc., a California corporation,
Appellants,

vs.

General Electric Company, a New York corporation; Borg-Warner Corporation, an Illinois corporation; California Electric Supply Company, a California corporation; Radio Corporation of America, a Delaware corporation; Whirlpool Corporation, a Delaware corporation; Maytag Company, a Delaware corporation; Maytag West Coast Company, a California corporation; General Motors Corporation, a Delaware corporation; Frigidaire Sales Corporation, a Delaware corporation; Norge Sales Corporation, an Indiana corporation,
Appellees,

and

Broadway-Hale Stores, Inc., a California corporation,
Defendant.

On Appeal from the United States District Court for the Northern District of California

BRIEF OF APPELLEE GENERAL ELECTRIC COMPANY

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BRIEF OF APPELLEE GENERAL ELECTRIC COMPANY

OPINION BELOW

The memorandum opinion and order by the Honorable Alfonso J. Zirpoli, Judge of the United States District Court, granting the motion of each appellee for a directed

verdict and directing the entry of judgment thereon, appears in the Clerk's Transcript of Record at R. 1912-1976.[1]

STATEMENT OF JURISDICTION

The complaints in these two actions, R. 1, 15, which were consolidated for trial, R. 1608, invoked the jurisdiction of the United States District Court under Sections 15 and 26 of the Sherman Act, 15 U.S.C. §§ 15, 26. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction from the judgment which the trial court entered pursuant to directed verdicts for all appellees.

Broadway-Hale Stores, Inc., one of the original appellees, was dismissed upon motion of the appellants subsequent to docketing of the appeal.

STATEMENT OF THE CASE

I. Questions Presented

A. Did the trial court err in holding that there was no substantial evidence from which a jury could reasonably infer the existence of a conspiracy among any of the appellees not to deal with appellants, and in directing a verdict for each of the appellees?

B. Did the trial court commit prejudicial error in excluding certain evidence offered by appellants or in its other evidentiary rulings?

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[1]In this brief the Clerk's Transcript of Record is cited as "R", followed by the page number. The transcript of the trial is cited as "Tr". Transcripts of Depositions are cited as "Dep. Tr." Exhibits admitted in evidence are cited "Exh.", and exhibits identified but not admitted in evidence are cited "Exh. Id." Appellants' Brief is cited as "Br. Appel." and the Specification of Errors as "Spec."

C. Did the trial court err in its pretrial rulings which (1) set the limits of discovery, (2) specified the issues to be tried, and (3) ordered that the issues of liability and damages be separately tried?

D. Did the trial court erroneously tax certain items of costs against appellants?

This brief deals chiefly with Questions (A) and (B) above. Question (C) is treated only with respect to the rulings on discovery, and Question (D) is not dealt with at all. The matters not discussed in this brief are fully analyzed and argued in the briefs of other appellees, and appellant respectfully asks the Court to consider those discussions as adopted in this brief.

II. Introduction

The complaints charged that appellees, who are manufacturers, distributors and retailers of television sets and free standing major household appliances,[2] conspired to restrain or monopolize interstate commerce in the sale of such goods in the San Francisco market, and, pursuant to such conspiracy, prevented appellants from obtaining such goods. The appellants are United Shoppers Exclusive (U.S.E.), the owner of a retail establishment on Alamany Boulevard in San Francisco, and Manfree, Inc., the major appliance and television concessionaire to whom U.S.E. leased space in its store. The period covered in the complaints was March 1957 to August 1964. R. 1; R. 15.

General Electric Company was sued through its General Electric Major Appliance Division, which manufactures General Electric Brand television sets and major appliances and distributes them to retailers in the San Francisco Bay Area; and through its Hotpoint Division,

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[2]Free standing appliances are contrasted with built-in appliances; the distribution of built-in appliances is not involved. Free standing appliances are frequently referred to as "white goods."

which manufactures Hotpoint brand major appliances and manufactured Hotpoint brand television sets for a short time at the outset of the period covered by the alleged conspiracy. The plaintiffs also sued Graybar Electric Company, Inc., the independent distributor through which Hotpoint products were sold to retailers in the San Francisco Bay Area.

The Major Appliance Division and the Hotpoint Division are each autonomous divisions of General Electric Company which at all relevant times manufactured and marketed their products independently of one another. Accordingly, this Statement of the Case will discuss, in turn:

(A) ''General Electric'' evidence, relating to General Electric brand merchandise manufactured by the General Electric Major Appliance Division headquartered in Louisville, Kentucky and distributed in the San Francisco Bay Area by the Burlingame Branch of the Northern California District of that Division.

(B) ''Hotpoint'' evidence, relating to Hotpoint brand merchandise manufactured by General Electric's Hotpoint Division headquartered in Chicago, Illinois, and distributed by the San Francisco office of Graybar, the independent distributor.

III. Statement of General Electric Evidence

A. General Electric Contacts With Appellants

The Major Appliance Division has never sold any of its General Electric brand merchandise to appellants. Tr. 5845, 5846. Contrary to appellants' claim that this failure to sell was in furtherance of a conspiracy with others, the facts established conclusively that the Major Appliance Division, which was enjoying excellent market penetration in the distribution of its product line, decided for substan-

tial, independent business reasons not to deal with appellants, unproven newcomers to the scene. Moreover, this decision was reached without consultation, communication or contact of any sort with any other appellee, or alleged co-conspirator, and without knowledge on the part of the Major Appliance Division of any demands by appellants for competing product lines or of refusals to sell pursuant to such demands.

The Major Appliance Division maintained its own distribution of white goods and television in the Bay Area, through its Northern District headquarters at Burlingame. This distribution was inherited in October 1956 from the General Electric Supply Company, another autonomous component of the company (Tr. 4188, 4189), which thereafter engaged in distribution of traffic or small appliances and radios. Tr. 5291-92.

On the Major Appliance Division's assuming the distribution of General Electric white goods and television, a program of selectivity of appointment of franchised retail dealers was instituted, with the number of retail dealers in San Francisco reduced by 1958 from 50 to approximately 25. Tr. 4190-4192. This was the decision of Mr. H. P. Gough, District Manager of the Appliance Division, reached before appellants had even commenced business operations and with no knowledge whatever of their operations. It was based on his determination that there existed a relatively static market for free standing white goods in San Francisco, demanding aggressive selling of the full line with accent on customer service, advertising, training, display, and proven ability in the community. Tr. 4191-4192.

Judging by market penetration the policy of selectivity in dealer franchising was successful, with General Electric enjoying a better market penetration with fewer dealers on the bulk of its product line. Tr. 4192.

With a program of selectivity, obviously some dealer applicants are disappointed. In fact about 90% of those applying were refused franchises. Included among these was Manfree.

U.S.E. operated a "closed door" operation, open only to those holding membership cards. As appellants' brief states, it was an operation characterized by "minimum overhead." Br. Appel. 2. General Electric representatives were unimpressed with the warehouse atmosphere, the confined space, the stocking of merchandise in cartons and poor display. Tr. 5222, 4354, 4396. U.S.E.'s earlier concessionaire handling white goods and television had failed financially. Obviously when the objective is selectivity based on proven success, coverage of the full line, display, salesmanship and service to the customer, a decision by General Electric not to franchise Manfree was not unpredictable.

The first encounter between the Major Appliance Division and appellants was brought on by a telephone call in November 1958 from Mr. Alpine, then President of Manfree, to Mr. Bernard Meseth, then Manager of Dealer Sales for the Burlingame Branch. Tr. 5193. Mr. Meseth visited the store and had lunch with Mr. Alpine and Bernard Freeman, the Vice President of Manfree, who requested the General Electric franchise. Tr. 5219. Mr. Meseth advised that General Electric already had a strong dealer structure in San Francisco and had no plans to add to it at that time. *Ibid.* He observed the warehouse atmosphere, inadequate floor space and sales force, on which he reported at a subsequent meeting with those in charge of distribution in the northern California district, Mr. Gough and Mr. Hobson. It was decided that General Electric should not franchise Manfree at that time, and no franchise was awarded. Tr. 5221, 5222, 4155, 4157, 5237.

Again in July of 1960, following receipt of a letter from Mr. Alpine requesting authorization to carry General Electric merchandise, see Exhs. 509-513, Mr. R. P. Swanson, then Manager of Dealer Sales at the Burlingame Branch, directed Mr. William Lau, a General Electric sales counselor, to contact Mr. Alpine at the U.S.E. store. Tr. 4349-50. Mr. Lau made such a call but was unable to get into the U.S.E. store premises and his view was blocked by a stack of television cartons in the front doorway. Tr. 4354, 4396. He met Mr. Alpine and Mr. Freeman at the U.S.E. business office, and received a request for a franchise. Lau advised that there was none available at that time. Tr. 4354.

B. General Electric and the Alleged Co-Conspirator Retailers

At various times the Major Appliance Division sold General Electric brand merchandise to certain well-established retail dealers in San Francisco, now claimed to be co-conspirators. See Exh. 148-A. The evidence of the relationship between General Electric and these retailers is exactly what one would expect; that is, it concerns the supplying of General Electric products and their display and promotion for sale by these retailers. Tr. 4136, 4142-44; 5183-84.

There is no evidence that any retailer in San Francisco ever discussed with General Electric the "who, what, when or wheres" of franchising other retailers in the San Francisco area. Each and every retailer examined on the subject flatly denied any request to General Electric not to franchise Manfree (Hobbs at Tr. 445; Sanford at Tr. 1337; Thomas at Tr. 1361; Shreck at Tr. 1770; Fuller at Tr. 1871). The testimony on the subject by General Electric witnesses was equally unequivocal. Mr. Harry Gough, then in charge of General Electric franchising in the area, and Bernard Meseth each testified that there was no communication with any retailer concerning appellants' requests for a General Electric franchise or any other matter remotely

related to appellants' charge of conspiratorial boycott. Tr. 4194, 4197, 5297. There was no discussion with any retailer concerning the franchising of so-called closed-door or discount house operations. Tr. 4194-95; 4198-99; 4392-98; 5296-98. No retailer even knew that appellants were requesting products from General Electric, or that General Electric had called on appellants. Tr. 5297. Nor was the decision whether to franchise Manfree discussed with any other component of General Electric; it was ultimately the decision of Mr. Gough. Tr. 5262-65.

Appellants seemingly infer, in their brief under the caption of "joint and collaborative action between the retailer defendants" (Br. Appel. 62, 68) that because Meseth spoke of General Electric's fine dealer structure (Meseth at Tr. 5219; Freeman at Tr. 5842-45) in declining appellants' request for a franchise, and acknowledged that "at any time we add to our dealer structure there is an element of risk [as to sales to other retailers generally]" (Tr. 5265), this is evidence of a conspiracy between General Electric and the alleged co-conspirator retailers in this case.[3] Such a contention is absurd on its face. Obviously distribution management has the right to determine for itself whether to franchise a large or small number of retailer outlets; it is self evident also that increasing the number of retailers may affect the volume of sales to established retail outlets.

C. General Electric and Alleged Co-Conspirator Manufacturers and Distributors

Mr. Gough (Tr. 4194-98) and Mr. Meseth (Tr. 5263-64, 5292-98) confirmed that the decision whether or not to

[3]This is the only evidence referred to by appellants relating to General Electric under this caption of their brief, save for some discussion of newspapers. There is not a shred of evidence that General Electric at any time had any contacts with any newspapers on any subject. For this reason General Electric in this brief will not further treat the assertions of appellants concerning newspapers.

franchise appellants was the decision of the Northern California District, and was not discussed either before or after it was made with any competing distributor or manufacturer. Nor were merchandising philosophies discussed with competition. Tr. 5298.

The record is devoid of any communications between General Electric and a competing distributor or manufacturer. There is no evidence that the persons responsible for selecting General Electric franchised dealers in the Bay Area had any discussions or exchanged any correspondence on any subject with any person having to do with the distribution of Frigidaire, Maytag, Hotpoint, RCA, Whirlpool or Norge brand products.

General Electric was a member of certain trade associations; namely, NEMA, AHLMA, and EIA. Such memberships provided General Electric a means to determine the extent of its market penetration in a given area. The mechanics were simple. Each member reported to the association the number of units sold of a given product and received periodically in return the total number of units of that product sold by all association members in the market area. There was no evidence that General Electric was ever supplied the market penetration of any other member. Nor was there any exchange of dollar information, as reporting was done in terms of units. See Exh. 149, an illustrative penetration analysis prepared by General Electric for its own use; Tr. 5281-82; Exh. 5048 (General Electric analysis based on AHLMA statistics); Exh. 5049 (General Electric analysis based on EIA statistics).

D. Retail Prices and Advertising of General Electric Brand Products

Attempting unsuccessfully to conceal the glaring defects in their case, appellants devoted an inordinate amount of trial time to matters concerning the pricing and adver-

tising of various brands of white goods and television which do not bear even peripherally upon any alleged conspiracy. These excursions led nowhere at the trial, and appellants have not succeeded in conducting them to an alternate destination by retracing the same steps in their brief. The following discussion is included principally to correct the most dire inaccuracies and misstatements employed by appellants in their circular journey.

1. Appellants' assertions concerning advertising practices and suggested list prices

Appellants assert that the manufacturers' published "price lists * * * with list (or retail) prices shown thereon" (Br. Appel. 28, 105, 123) and that the distributors based their retail prices thereon (Br. Appel. 28, 123), the distributors "requiring" their retailers to advertise at these prices under penalty of not receiving their advertising allowances (Br. Appel. 78, 92, 123).

As to General Electric the only foundation for these extravagant assertions is that General Electric published price lists which contained not only the cost to the retailer, but also a "suggested retail price" which the retailers were free to follow or not. Tr. 5223. The record is clear that in some cases the retailers followed this price and in others they did not. Tr. 5223, 1431-32, 1450, 2352-53. Every other stanza of this incantation in appellants' brief is either inapposite to the General Electric distribution system or directly refuted by the record.

The Major Appliance Division handled its own distribution of General Electric brand products. Any price sheets used by General Electric were promulgated directly to retailers without any advice or assistance from any third parties.

Nor was there any evidence that General Electric's "suggested retail price" was anything more than a sug-

gestion. The uncontradicted testimony that General Electric never required its retailers to advertise at suggested list, and at no time conditioned its advertising moneys on advertising at suggested list, was confirmed by the retailer witnesses Thomas at Tr. 1532; Sanford at Tr. 729-30; and others. Meseth of General Electric testified that retailers sometimes followed suggested list in their advertising and sometimes did not, Tr. 5223, with advertising at suggested list not a condition of receiving cooperative advertising moneys. Tr. 5225.

Appellants base their contrary assertions on Exhibits 714, 717 and 708. Br. Appel. 34. Exhibit 714 contains no statement concerning "suggested retail price" or any price whatsoever. It is a denial of a Hale's advertising claim because of General Electric's policy that cooperative advertisements be authorized in advance by General Electric. This is obviously a reasonable means for establishing compliance with conditions of General Electric's advertising programs designed to insure equal treatment to all, to protect trademark interest and to protect against false and misleading claims. See Tr. 5225, 5248. Exhibit 717 is in the same category. It likewise makes no mention whatsoever of prices or price policy. This Exhibit is a partial denial by General Electric of a Hale's advertising claim exceeding the amount to which Hale's was entitled under policies providing for equal treatment to all. See Tr. 5248, 5293. Had General Electric not limited Hale's to proportionately equal treatment by denying the claim, appellants would be arguing the allowance of excessive advertising funds.

Nor does Exhibit 708 evidence any price restriction on advertising funds. This letter from a General Electric sales trainee to Hales states the obvious fact that, in 1961, Hales was free as a practical matter from any market influences upon its pricing of an outmoded 1957 model refrigerator (an LJ12 refrigerator being a 1957

model; see Tr. 5348), of which Hales had all the remaining models in the area. *Ibid.* Even the most antithetic economists would unite in this conclusion.

There are implications in appellants' brief that General Electric participated in a scheme requiring affidavits or similar certificates of proof from its retailers to show selling at suggested list price. At page 108 it is stated that "The practice of requiring retailers to report, under oath, the prices at which appliances are sold by them pursuant to a trade association's promotions, was followed and enforced by appellees GE, * * *." Another ominous note of price maintenance is sounded with the statement that "GE, Maytag and RCA required retailers to sign affidavits that they had engaged in no comparative price advertising." *Ibid.*

These arguments are an extension *ad absurdum* of the facts in the record. Exhibit 2090, to which appellants refer for proof that retailers were required to report their prices under oath, is a report of a Northern California Electrical Bureau (N.C.E.B.) meeting on January 29, 1959, and a then current Pacific Gas & Electric promotional campaign exhorting housewives: "Don't be a dishwasher. Buy one." Prizes were awarded to participating dealers who sold the most dishwashers. The planners of the promotion did not wish to award equally the seller of a $100 dishwasher and the seller of a $200 dishwasher, so a minimum value was established for sales which would qualify under the promotion. Suggested retail price was a suitable yardstick for comparing the value of competing brands, so participating dealers making claims for payment were asked to state the manufacturer's suggested retail price for the dishwasher. The dealers were not required to state the price at which the dishwasher was actually sold or to verify that it was sold at suggested retail price. Tr. 980-83. The chasm between

this evidence and the claims appellants make for it is too vast to warrant further comment.

As for the affidavits concerning "comparative price advertising"[4] the uncontradicted evidence was that if General Electric required them at all, it was to ensure observance by its retailers of "truth in advertising" requirements established by the Federal Trade Commission. Tr. 5225-5228.

2. "Discrimination in Pricing"

"Price discriminations to retailers" is another of the signposts we encounter on appellants' "magical mystery tour". The claim is made that "most of the distributors" adopted a policy of publishing "coded" price sheets, providing different purchase prices to different retailers and false discounts to favorite dealers (Br. Appel. 29), that discriminatory terms in the purchase of goods were "established by direct evidence, between such vendors and Hale" (*Id.* at 93), and that "vendor appellees and co-conspirators treated Hale [and the other alleged retailer conspirators] as 'key' accounts, allowing them special price lists * * *" *Id.* at 106.

At no time did General Electric provide coded or special price sheets to any dealers. Tr. 5295-96. There is not a whit of evidence that it did. Nor did it offer volume discounts other than to all retailers on equal terms. Appellants in their brief have detailed no evidence to support such a claim against General Electric. No such evidence exists. See Tr. 5280, 5296.

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[4]The term "comparative price" has nothing to do with interbrand price comparisons. It refers to comparisons of the "now" price with the "was" price of a particular brand.

3. ''Special Advertising Funds''

Appellants assert that the ''manufacturers made available large advertising funds to selected dealers'', (Br. Appel. 30; see *id.* at 37, 79), that ''key'' retailers enjoyed special advertising rates, *(id.* at 31, 93, 106), and that Hale's was a ''key advertiser'' for General Electric. *Id.* at 113. General Electric allegedly allowed Hale ''100% paid advertising''. *Id.* at 41. Appellants' zeal in urging these claims at trial was unflagging, despite their lack of any real relevance to the conspiracy charged. The passing of time has only quickened appellants' ardor.

These assertions seek to imply favoritism by General Electric to Hale's or other selected dealers. The implication is false and unsupported by the record. The facts are clear that no preferences were given. The retail witnesses questioned on the administration of the General Electric advertising program denied any preferential treatment. Tr. 730-37, 816-17. The General Electric witnesses likewise denied the charge. Tr. 4393-95, 5292-93, 5334, 5343, 5355.

The General Electric advertising programs were described by Mr. Meseth, Advertising Manager for the Northern California District from December 1959 to July 1961. To promote local advertising, General Electric adopted and administered cooperative advertising plans, whereby General Electric would generally bear a portion of the publisher's listed advertising rate (the portion being referred to by General Electric as its flat rate, Tr. 5230) on the basis of credits earned by the retailer through its volume of purchases. Tr. 4395. Each retailer, large or small, was entitled to payment by General Electric for so many lines of advertising at the flat rate; *i.e.,* on a proportionately equal basis, depending upon the volume of his purchases. Tr. 5293. Frequently special promotion campaigns were featured by General Electric under

catchy titles such as "spotlight promotion", see Exh. 712, to induce greater dealer participation. In such cases, General Electric offered to pay all its retailers a higher percentage of the listed advertising rate than the normal "flat rate". These "special flat rates" could increase to as much as 100% of the publisher's listed advertising rate, the extent of the offer still being determined, however, by credits earned according to the number of units purchased by the retailer of the particular appliances being promoted. Again the offer was made on a proportionately equal basis to all. Tr. 5345, 5347, 5355-56.

The exhibits cited by appellants in their brief (Exhs. 708, 712, 713, 715 and 717; see Br. Appel. 41, 113) to evidence special advertising consideration to Hale's contain no such evidence. Exhibit 708, already discussed, deals only with the sale to Hale's in September 1961 of General Electric's remaining inventory of a 1957 model refrigerator. This was not a special model for Hale's and was offered to all dealers. Tr. 5349.

Exhibits 712 and 713 are illustrations only of General Electric authorizations to Hale's for advertising allowances, at special higher rates available to all during special promotional campaigns. Exhibit 717, also discussed above, is a General Electric letter evidencing only its continuing efforts to administer the cooperative advertising program on a proportionately equal basis to all.

Exhibit 715 concerns a slightly different advertising program. Occasionally General Electric announced "dealer listing programs" enabling subscribing dealers to be listed as a participating retailer in advertisements run by General Electric directly in a given market area. This program was open to all, on equal terms, Tr. 5278; 5342-5343, and Exhibit 715 merely corroborates Hale's participation during the year 1960. Tr. 5343.

Other attempts by appellants to weave a thread of favoritism through the fabric of a non-discriminatory advertising program were equally unsuccessful. There was no difference in funds available to a dealer, whether he was large or small. Tr. 4393. A dealer could advertise in any media he chose. Tr. 4394. He could have an in-store promotion or a backdoor sale. Tr. 4395, 5246, 5248. The principal thing required of a dealer was that he confirm to General Electric that the funds had been spent, with the advertising monies available being limited by the volume of purchases. Tr. 4395.

IV. Statement of Hotpoint Evidence

A. The Marketing of Hotpoint Products in the San Francisco Area

At no time during the relevant period did General Electric's Hotpoint Division sell any of its Hotpoint brand white goods[5] or television to retailers in the San Francisco area. All Hotpoint sales were to Graybar Electric Company, Hotpoint's independent distributor for the area. Tr. 3045, 4426-27. Exhs. 31-34. Hotpoint had no reason to change its well established method of distribution in order to sell directly to appellants.

Hotpoint and Graybar carried on business contacts which were the normal concomitant of their common interest in promoting the sale of Hotpoint products in the San Francisco area. Tr. 3091. These contacts in no way detracted from Graybar's position as an independent distributor which established its own pricing, advertising and marketing policies for the products it distributed. Tr. 3087-90, 3277-79. Graybar is a nationwide concern, Tr. 3045, distributing appliances manufactured by competitors of Hotpoint in other areas (for example, Norge products in Los Angeles, Tr. 2916), and numerous products other than

[5]Free standing major appliances.

Hotpoint in the San Francisco area. Tr. 3267. It was by no means an alter ego or hip pocket operation of Hotpoint.

Appellants' efforts to show that the relation between Hotpoint and Graybar exceeded the dimensions of that between a manufacturer and its independent area distributor fell far short of the mark. Dealer record cards which Graybar used to notify the Hotpoint Statistical Department that a retailer had been newly franchised or that his franchise had been cancelled were introduced in evidence. Exhs. 4188, 4189, 536-C. No testimony or other evidence was produced tending to show that these notices represented anything other than *post facto* notification by Graybar to Hotpoint of steps already taken by Graybar, without advance consultation or approval from Hotpoint. See Tr. 4443-45. Likewise, there was no evidence that Hotpoint ever took any *post facto* steps respecting these decisions, except to congratulate Graybar on appointing Hale Brothers as a dealer in April 1961, some 2½ years after the alleged conspiratorial termination of Manfree took place. See Exh. 638.

Graybar also supplied Hotpoint with statistical reports of total unit sales of various Hotpoint products made by retailers. Tr. 3055-57, 3075-76, 4436-37. See Exhs. 13, 4267, 4268. Hotpoint received reports only of total units sold and received *no information* as to either unit price or dollar volume. Tr. 4436, Exhs. 4267, 4268.

The repeated assertion by appellants that Hotpoint maintained suggested retail prices is belied by uncontradicted testimony that Hotpoint abandoned suggested prices in 1958 and never resumed their use. Tr. 3278. There was no evidence that Hotpoint had knowledge or participated in any way in the suggested retail prices published by Graybar, see Tr. 3093, or the Graybar practice of conditioning advertising monies disbursed by it

on the advertising of Graybar's suggested list prices if a price were to be advertised. Tr. 3277.

Appellants' monotonous battle cry of "special advertising funds" fails to rally any facts to show favoritism by Hotpoint to a particular retailer. While in their brief, as at trial, appellants assume rather than persuade one of the relevance of such matters, the subject will be briefly treated.

Appellants do not dispute what is incontrovertible, namely, that Hotpoint never made *any* advertising funds available directly to any retailer in San Francisco.

To be sure, Hotpoint made advertising funds available to Graybar. Tr. 3088. At this threshold, appellants' argument and the evidence go their separate ways. Hotpoint contributed these funds on the basis of 1½% of Graybar's purchases of Hotpoint products. Tr. 3089. Graybar matched the funds and spent the money for local advertising in cooperation with its participating retailers. Tr. 3088. Graybar alone decided how the funds were to be spent and to whom they were allocated. *Ibid.,* Tr. 3090, 4439. The policies under which the funds were expended were developed by Graybar, without Hotpoint's participation, approval or knowledge. Tr. 3086-87, 3277-79. Hotpoint had no policies of its own regarding these expenditures, except that the funds be made available on an equal basis to all retailers. See Exh. DGE 8345-G; Tr. 3281. In fact, it generally had no knowledge of how they were spent or to whom they were allocated by Graybar. Tr. 4439-40.

Graybar occasionally requested, and Hotpoint occasionally extended, additional advertising funds for special promotions of particular products. Tr. 3094. Hotpoint acquired some knowledge as to the use of these funds, either from program requests which Graybar submitted or from newspaper tear sheets or other indications of

actual use that Hotpoint sometimes requested of Graybar. Tr. 3220. In most cases, Hotpoint made no such request. *Ibid.*, Tr. 4439. Any such requests were a reasonable check employed to determine that the funds were employed for the promotions requested.

These facts conclusively refute any inference that Hotpoint discriminated in favor of any retailer in its distribution of advertising funds to Graybar. Hotpoint neither directed nor conditioned the distribution of any funds disbursed by it to Graybar, except to request equality. To imagine that a conspiracy to do anything could be constructed on this erratic basis is indeed a mental *tour de force,* but hardly one generated by reason.

B. Hotpoint and Appellants

The evidence in this case was that the only contacts between Hotpoint and appellants consisted of:

a) a routine promotional call by Orville Ransom, a sales representative of Hotpoint employed in the Bay Area until December of 1957, at the store premises of Manfree in 1957, while Manfree was franchised by Graybar. Tr. 4429-32. Ransom left the Bay Area in December of 1957, to be stationed until November 1958 with Hotpoint in Portland where Hotpoint carried on its own distribution. Tr. 4428, 4443. There was no evidence that Ransom had any knowledge of Graybar's decision to terminate Manfree in October 1958, or communicated in any manner with anyone on any subject related to the franchising of Manfree or the termination of its franchise by Graybar, or his visit to Manfree. Tr. 4430-32, 4445-46. When Ransom was in Portland there was no representative of Hotpoint in the Bay Area. Tr. 4475.

b) Hotpoint was on the receiving end of appellants' form demand letter for product in June 1960 (Exh. 537), six weeks before it was sued, and again subsequent to the

initiation of litigation (Exh. 538). As Hotpoint was not engaged in retail distribution in San Francisco, there was no reason for it to alter its distribution practices in the case of Manfree.

C. Hotpoint and the Alleged Co-Conspirator Retailers

No significant contacts between representatives of Hotpoint and any of the retailers alleged to be co-conspirators were shown by the evidence.

During the period prior to December 1957 when Ransom was employed by Hotpoint in San Francisco as a sales representative, his duties were to "show the flag" of the Hotpoint line to the various franchised retailer dealers of Graybar. See Tr. 4429-30. While he presumably called upon Macy's, the only alleged co-conspirator franchised at that time by Graybar,[6] no Macy's witness appeared at the trial and Ransom was not questioned about any conversations with Macy's, so the record is devoid of evidence of any communication exchanged between any alleged co-conspirator retailer and any Hotpoint representative on any subject during the period in which appellants were franchised by Graybar.

Faced with this vacuum, appellants attempt to give some sinister significance to the get-acquainted visit to San Francisco of the then newly appointed Manager of the Hotpoint Division, and Vice President of General Electric, William L. Wichman. By deposition Mr. Wichman testified of his appointment as Manager in May or June of 1958, and described a visit at some time thereafter throughout the entire west coast in connection with the assumption of his duties. While in San Francisco he recalled meeting some retailers, stating he was always interested in meeting retailers and impressing them with the desirability of the Hotpoint line. He recalled no dis-

[6]Exh. 4268.

cussion concerning U.S.E. and never discussed with Hotpoint management the question of whether or not U.S.E. should be franchised. Tr. 5420-21, 5449. The only retailer which Wichman could specifically recall was Macy's. Tr. 5417. No retailer witness at the trial testified to any meeting with Wichman. Lest appellants attempt to distort a chance meeting with a Macy's representative into evidence of conspiratorial conduct pointed toward U.S.E., it should be noted that Macy's was franchised by Graybar for Hotpoint products both before and after the termination of Manfree, with Macy's sales of the Hotpoint line being substantially better during the period of Manfree's franchise than after Manfree was terminated. Exh. 4268.

Following the decision of William H. Mayben, the Appliance Manager for Graybar, to terminate Manfree, Ransom did return to the Bay Area stationed in San Mateo as a representative of Hotpoint, but in a different capacity, namely, as marketing representative of the entire western region of the United States. Tr. 4428. There was no evidence of any communication exchanged between Ransom and any alleged co-conspirator retailers on his return. In fact the witnesses representing retailers who carried the Hotpoint line under Graybar franchise subsequent to his return could not recall meeting a representative of the factory at any time. Thomas of Hale's at Tr. 1461; Schreck of Sterling at Tr. 1701; Laird of Lachman at Tr. 1922; Tobin of Sterling at Tr. 2215. This is understandable in view of the large "circuit" which Ransom then covered, and the fact that he would probably call on floor salesmen rather than retailer management.

D. Hotpoint Relations With Alleged Co-Conspirator Distributors and Manufacturers

There is no evidence of any exchange of communication between Hotpoint Division of General Electric and a dis-

tributor or manufacturer of a competing product line. The record shows only that Hotpoint, like certain other manufacturers, had a representative who occasionally attended local business association meetings of the NCEB. All witnesses questioned on such meetings denied any discussion of franchising U.S.E., or any subject related thereto. *E.g.,* Tr. 919-20; 985; 3131; 3142, 4063-71.

E. The Circumstances of Graybar's Termination of the Manfree Franchise

Manfree had held a franchise from Graybar as to Hotpoint brand white goods and television commencing in May of 1957, of which Graybar duly notified Hotpoint. Exh. 536. For reasons to be noted, Mayben, the District Appliance Sales Manager of Graybar, decided to terminate this franchise in the fall of 1958, by notice of cancellation dated October 28, 1958. Exh. 525.

The circumstances of Graybar's termination were these: William Mayben had been appointed District Appliance Sales Manager for Graybar in April of 1958, when sales were slipping. Tr. 3268. He became aware that Graybar had a considerable number of dealers who were not doing an adequate job in increasing market penetration or giving full line support to Hotpoint products, these dealers including Manfree, whose principal strength earlier had been in the sale of the television line which was to be discontinued by Hotpoint. Tr. 3270-71. Manfree sales of Hotpoint brands had declined in 1957, and were further declining in 1958, particularly in laundry equipment, where Mayben felt help was particularly needed.[7] These

[7]As shown by Exhs. 4267 and 4268, the 1957 and 1958 unit sales reports by Graybar to Hotpoint, 1957 sales by Manfree of white goods were 293 and of television, 189, for seven months of operations. In 1958 for the full 11 months during which it held the Graybar franchise, Manfree sales had dropped to 150 white goods and 35 television, with but 11 of laundry equipment.

matters were discussed with Mayben's superior, G. L. Call, Graybar's District Manager, and together they weeded out approximately 15 to 20 dealer franchises in the San Francisco area which were not meeting the sales and promotional standards considered essential for Graybar to increase its market penetration for Hotpoint products. Mayben testified that this decision concerning the Manfree cancellation was his and his alone, and was not discussed with anyone outside of Graybar, including anyone from Hotpoint-General Electric. Tr. 3272, 3266.

As earlier noted, while Hotpoint had maintained a sales representative in San Francisco (Orville Ransom) during the period October 1956 to December 1957, there was no Hotpoint office open in the San Francisco Bay Area from December 1957 to November 1, 1958. Tr. 4475. The fact that Manfree was terminated by Graybar did not come to Ransom's attention while he was in Portland and he was not notified of it before it happened. Tr. 4445-46. The evidence therefore fails to establish any participation by Hotpoint in Graybar's decision.

Graybar's franchising of other retailers does not support appellants' hypothesis of conspiratorial activity engaged in with these retailers. As noted earlier, Macy's was franchised both before and after Manfree's termination, with its sales not increasing (as appellants would infer) after the Manfree termination, but rather decreasing. A second retailer, Redlick-Newmans, never held a Graybar franchise. Hale's was franchised in April of 1961, totally removed in time and business context from the Manfree termination. See Exh. 638; Tr. 3167-68. Lachman and Sterling franchises were not granted until eight and ten months respectively after the Manfree termination. See Exhs. 4188-B, 4189.

V. Summary of the Case in General

To this point, this statement of the case has mainly been a comparison of the record with the unsupported and exaggerated statements in appellants' brief concerning the operations of General Electric and Hotpoint. This approach, however necessary in the circumstances, does not adequately direct the Court's attention to the major flaws in appellants' case. This action was brought under the Sherman Act and alleges an illegal conspiracy, combination or agreement to boycott appellants and prevent them from obtaining major brands of television sets and household appliances. It is not an action claiming unlawful price discriminations or discriminatory advertising allowances. Over the objections of appellees, most of the trial was consumed in examining questions such as whether a particular distributor of television or appliances did or did not afford a particular retailer (with appellants' attention seemingly centered on Hale's) discounts or advertising allowances that were not equally available to other retailers.

General Electric insists that there is no evidence to support a finding that it discriminated in any manner in favor of Hale's or any other retailer and that the record conclusively establishes no favoritism existed. See pp. 13-16, *supra*. Even if some favoritism were shown, however, it would not support a finding that General Electric and Hale's (or such other favored retailer) conspired to boycott Manfree. On this central issue of a conspiracy to boycott, there is no evidence whatever.

Nor does the record show "conscious parallelism". In the case of General Electric, there is no evidence that either the Major Appliance or Hotpoint divisions knew of any decisions made by those in charge of distributing Norge, Whirlpool, RCA, Hotpoint, Maytag or Frigidaire not to franchise Manfree. At the time of Bernard

Meseth's visit to U.S.E. on behalf of General Electric-Major Appliance Division on November 5, 1958, Manfree was still stocking and buying Maytag, whose franchise expired by its own terms in March of 1959 (Tr. 3375; Exh. DMT 13143; Exh. 1523), and held Hotpoint products in stock, since Graybar had just notified appellants of its decision to terminate. See Exh. 525, dated October 28, 1958. It was stocking the Admiral line. There is no evidence that either Mr. Freeman or Mr. Alpine discussed with Mr. Meseth any of their conversations with Lancaster representatives concerning the Norge line, or Graybar representatives concerning the Hotpoint line,[8] or California Electric representatives concerning the Philco line. Similarly, there is no evidence that at that time appellants had made demands upon Frigidaire, A. H. Meyer Co., Whirlpool or RCA, so that Meseth could not have known of any refusals to deal by them.

Hotpoint was totally incognizant of Manfree's business relations with any other distributor. No Hotpoint representative visited appellants except for Mr. Ransom, who did so in 1957 when appellants were buying and selling the Hotpoint brand as well as several other brands. Hotpoint received no report of this visit.

The record likewise shows no relationships between retailers and their distributors involved in this appeal which could conceivably evidence an agreement not to franchise U.S.E. Obviously, retailers and their particular distributors engage in some interchange concerning business matters. But there is no evidence that such communications ever assumed the character of concerted agreement between a retailer and the supplying distributor not to deal with appellants.

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[8]Meseth recalled that Freeman had advised him of being terminated by an unidentified distributor, for which it was going to "pay dearly". Meseth considered this threat a weak foundation on which to embark upon a business relationship. Tr. 5218.

Much trial time was spent on whether particular distributors conditioned advertising allowances on suggested retail price being advertised if any price were to be advertised. The evidence showed great disparity in the distributors' practices. Some, like California Electric and Graybar, did announce such a policy to their franchised retailers. Others, including General Electric, never imposed such a condition. Others, such as Frigidaire after 1960 and Hotpoint after 1958, did not even have suggested list prices. This evidence concerning administration of cooperative advertising funds is not a basis for a reasonable inference of any illegal conspiracy to boycott Manfree.

The record, therefore, is worth discussing as much for what it does not show as for what it does. It does not show any of the elements required for proof of an unlawful conspiracy or agreement. It does not show parallelism among the defendants, nor a consciousness of parallelism, nor of commitment to a common unlawful scheme. It shows only competing distributors concerned with achieving the highest possible market penetration for their individual product lines and following autonomous marketing policies in an effort to realize this goal.

SUMMARY OF ARGUMENT

The trial court's ruling directing a verdict in favor of appellee General Electric Company was eminently correct. There was no evidence that either the General Electric Major Appliance Division, which elected not to sell appellants because of its fine existing dealer structure and market penetration, or the Hotpoint Division, which elected not to sell any retailer in the San Francisco area, were acting pursuant to any conspiracy. There is no factual or legal basis for charging Hotpoint with partici-

pation in a conspiracy through its independent area distributor, Graybar Electric Company. There was no evidence of any kind of conspiracy not to sell appellants.

The trial court committed no prejudicial error in excluding certain documentary evidence offered by appellants against General Electric Company or in its other rulings on evidentiary matters affecting General Electric.

The pre-trial rulings of the court which limited certain of the appellants' excessive and repetitive discovery demands against General Electric were correct.

ARGUMENT

I. THE COURT CORRECTLY DIRECTED A VERDICT FOR GENERAL ELECTRIC AND THE OTHER APPELLEES BECAUSE THERE WAS NO EVIDENCE OF A CONSPIRATORIAL REFUSAL TO DEAL

Appellants do not question the basic principle that an independent refusal to deal with another, for whatever reason, is not a violation of the antitrust laws. *United States v. Colgate & Co.,* 250 U.S. 300, 307, 63 L. Ed. 992, 997 (1919). The evidence showed nothing other than the exercise, at various times, in various fashions and for various business reasons, of this basic right.

Management decisions on product distribution are complex ones. As the evidence showed, it is by no means a simple case of offering the product to the maximum number of retail outlets. Decisions as to the nature and number of retail outlets are influenced by many factors, including the type of product and the nature of the market. Light bulbs are merchandised differently from an appliance requiring a major investment. Salesmanship, service and a community reputation of long standing play an insignificant role in retailing light bulbs. Conversely, these

factors are of prime importance in merchandising a major appliance. The appliance customer wants to be certain that the retailer will provide him the follow-up service that might be required, and, because the stakes are much larger, more time and expense are spent to convince the customer to choose one appliance over another. The testimony at trial exemplified the differing influence of such factors upon the sale of small appliances, such as toasters and radios, as compared to television sets and major household appliances. Tr. 4196-98, 5292.

The nature of the market is also significant. In an expanding market, a seller may gamble with a greater number of retail outlets to seek a higher market penetration, while in a restricted or declining market, concentrated selling techniques become more important. Where various products are in competition within such a market, as in this case, see Tr. 4192, it becomes more important for the distributor of each product to have retail outlets that will promote that product in preference to another brand. The record is replete with illustrations of the devices employed by the various distributors to increase their penetration of this market at the expense of their competition.

Manufacturers or independent distributors are not compelled to resolve these choices of retail outlets in favor of new and unproven types of merchandisers, let alone to select particular franchise applicants, upon pain of violating the antitrust laws if they do not. *Windsor Theatre Co. v. Walbrook Amusement Co.,* 189 F. 2d 797, 798-99 (4th Cir. 1951).

At the time of Manfree's demand for a General Electric franchise, General Electric had excellent market penetration through carefully-selected dealers who were selling the General Electric product in attractive surroundings, promoting the General Electric line in preference to com-

peting lines, and enjoying a good reputation for customer service and satisfaction. In sum, General Electric was employing established retail outlets with marked success. It was not required to experiment with a new and untried type of appliance and television retailer such as appellants, featuring "low overhead" (Br. Appel. 2) and similar types of customer inducements.

Appellants appear to employ "dealer structure" as an attempted synonym for an unlawful agreement between a distributor and one or more of its retailers. The law does not permit the type of inference embodied in this arbitrary equation. If recognition of the risk element inherent in any addition to dealer structure was enough to establish an unlawful agreement not to franchise a particular applicant, cases would be decided purely on abstract speculation. This is hardly the law:

> [P]laintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence, [but] he must rely upon reasonable and logical inferences from the evidence in the record. Plaintiff cannot go to the jury on the basis of speculation, surmise or conjecture.
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> *Independent Iron Works, Inc. v. U. S. Steel Corp.*, 177 F. Supp. 743, 746 (N.D. Cal. 1959) aff'd 322 F. 2d 656 (9th Cir. 1963) *cert. denied* 375 U.S. 922 (1963).

Distributors have the right to be selective and to restrict the number of their retailers: *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 18 L.Ed. 2d 1249 (1967); *Standard Oil v. Moore*, 251 F. 2d 188 (9th Cir. 1957).

Turning to Hotpoint products, the application of the *Colgate* doctrine stated at the outset of this argument is inescapable. The Hotpoint Division elected, in the exercise of the independent business discretion permitted it under that rule, to sell *no retailer* in the San Francisco

area. There was no conspiratorial aspect to this decision, and appellants did not undertake to show the contrary. Nor did they show that Hotpoint ever made any exemptions to its policy of selling only to its independent distributor.

Appellants, with no foundation for a case against the Hotpoint Division, have aimed their fire against Graybar, the independent distributor. So far as Hotpoint is concerned, this fusillade is beside the mark for it is well-established in law that a distributor who buys products from a manufacturer and resells them to retailers is not the agent of the manufacturer. The independent acts of the distributor are no foundation for antitrust charges against the manufacturer. *Brosius v. Pepsi Cola Co.,* 155 F. 2d 99, 102 (3d Cir. 1946); see *Matthews Conveyor Co. v. Palmer-Bee Co.,* 135 F. 2d 73, 77-81 (6th Cir. 1943).

Appellants' at best halfhearted attempts to show that the relation between Hotpoint and Graybar was anything other than manufacturer and independent distributor were put to rout by the evidence. It was repeatedly shown that Hotpoint's involvement in San Francisco marketing was limited to being supplied statistical information concerning sales in units and the identity of retail outlets, and providing monetary assistance to Graybar for the promotion of Hotpoint products, with a Hotpoint representative traveling a large circuit to lend occasional practical assistance to the promotion of the product line to retailer floor salesmen. Such contacts are without significance to the charge made by appellants and are no reasonable basis for an inference that Hotpoint and Graybar and/or other appellees agreed to exclude Manfree from the market.

Nor was Graybar shown to have conspired with anyone else against Manfree. The testimony established that the decision to cancel the Manfree franchise was made en-

tirely within Graybar. Graybar's policy of conditioning cooperative advertising monies on either no price or Graybar's suggested list price being advertised was simply an announcement in advance of the terms on which funds would be distributed, no more proof of a conspiracy than an advance announcement of terms under which one will refuse to sell; cf. *United States v. Colgate & Co., supra.*

The theory of "conscious parallelism" upon which appellants seek to rely requires "some consciousness of a commitment to a common scheme". *U.S. v. Standard Oil Co.,* 316 F. 2d 884, 890 (7th Cir. 1963). This threefold test of consciousness, commitment and common scheme can hardly be met when the very first and most basic element is lacking. Neither the Major Appliance Division nor Hotpoint were shown to be conscious of any demands or refusals concerning Manfree by alleged co-conspirators.

Even proof of "conscious parallelism" would not support a finding of conspiracy, for it is well established that such business conduct is without significance unless it takes place under circumstances which logically suggest joint action or agreement. As the District Court stated in *Independent Iron Works, Inc. v. United States Steel Corp., supra,* 177 F. Supp. 743 at 746-747:

> "* * * Proof of parallel business conduct is not a substitute for proof of conspiracy, and similar conduct, as such, does not establish conspiracy. * * * The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy."

Appellants place great reliance on *Standard Oil Co. of California v. Moore,* 251 F. 2d 188 (9th Cir. 1957), in support of their argument that sufficient evidence of a conspiracy was presented. This decision is readily dis-

tinguishable, and requires no such conclusion. In *Moore,* the plaintiff contended that a large scale conspiracy existed (as do appellants in the case at bar) with the object of maintaining retail gasoline prices in the Seattle area. This Circuit specifically held that the evidence was insufficient to establish such a conspiracy and would support only a concerted refusal to deal. 251 F. 2d at 205. This evidence included the fact that in the past, one supplier, seeking removal of curbside price signs for gasoline products, had been able to bring about removal of similar curbside signs of retail outlets of other suppliers on short notice. *Id.* at 209. The record also showed a practice of suppliers getting "clearance" from one another before taking on a new retail account, *id.* at 210, and a threat made by one supplier that the plaintiff Moore's actions were ill considered and, if continued, could result in his inability to obtain any brand of gasoline. *Id.* at 208. Such evidence, together with additional illustrations of uniform practices of the suppliers, such as discontinuing split pump accounts in a uniform manner, *id.* at 209, sufficed to show consciousness of a commitment by the suppliers to a common scheme horizontally to refuse to deal with the plaintiff Moore's retail outlet.

Similar circumstances do not exist in this case. There was no suggestion of any clearances between distributors before franchising of retail outlets, nor any suggestion that one distributor on demand could obtain parallel conduct from another distributor. In fact, relevant communications between the distributors were nonexistent.

The decision of *Girardi v. Gates Rubber Co.,* 325 F. 2d 196 (9th Cir. 1963), is also of no avail to appellants. That case dealt with a distributor who, having knowledge of a manufacturer's resale price maintenance policy which would result in the manufacturer's termination of a distributor failing to comply with the policy, complained to

the manufacturer concerning a competing distributor, with the result that the franchise of the competing distributor was terminated.

There is nothing remotely apposite to the Girardi situation in the case at bar. General Electric (Major Appliance Division) at no time dealt with Manfree, nor did it ever inform retailers that it was being asked to, or had refused to, deal with Manfree. There was no evidence of complaint to GE concerning Manfree. The same is true of the Hotpoint Division. It never dealt with Manfree and never received complaints about Manfree. Nor is there any evidence that General Electric at any time took any punitive action against any retailer pursuant to any complaint of a competing retailer.[9] There is, therefore, no circumstance whatever to support an inference of some unlawful conspiratorial commitment between either division of General Electric with any retailer or distributor.

II. THE TRIAL COURT COMMITTED NO PREJUDICIAL ERROR IN ITS EVIDENTIARY RULINGS

A. The Applicable Principles Supporting the Trial Court's Rulings Are Established by Decisions of This Court and Other Circuits

Appellants challenge numerous rulings by the trial court on matters of documentary or testimonial evidence. This brief deals with the Court's rulings on evidence concerning General Electric or its Hotpoint Division. The

[9]Appellants note that Lau, General Electric Sales counselor, mentioned a complaint or two made to him by retailers in the years of his work as a General Electric salesman about retail prices employed by competing retailers. The record established that Lau took no action whatever and made no reports of such complaints to GE management. Such facts do not evidence a conspiracy. *Klein v. American Luggage Works*, 323 F. 2d 787, 791 (3rd Cir. 1963).

briefs of other appellees deal with the rulings on evidence directly concerning those appellees.

The trial court's rulings were in complete harmony with the principles applied by the federal courts in cases of this type. Appellants' offers of documentary and testimonial evidence repeatedly ran afoul of the ground rules stated by this Court in *Standard Oil Co. v. Moore,* 251 F. 2d 188 (1957), *cert. denied* 356 U.S. 975 (1958) and *Flintkote Co. v. Lysfjord,* 246 F. 2d 368 (1957), *cert. denied* 355 U.S. 835 (1958).

The decisions in *Standard Oil Co. v. Moore* and *Flintkote Co. v. Lysfjord* are authority that:

(1) Out-of-court acts or declarations of a co-defendant or alleged co-conspirator are not admissible against another defendant without a *prima facie* showing of the conspiracy and that other defendant's participation therein.

(2) Documents obtained from business files are not admissible as a "business record" against *any* defendant unless the proponent shows, by way of foundation, that the document was prepared (a) in the regular course of the business; (b) in timely fashion; (c) by an authorized person.

(3) Acts or declarations of an agent or employee allegedly constituting admissions are not admissible against the principal unless the proponent shows, by way of foundation, that the agent or employee was authorized to act or speak (as the case may be) for his principal as to the transaction in question.

In *Standard Oil Co. v. Moore* the plaintiff offered a mass of documents copied from the files of the seven defendant oil companies. The trial court admitted the documents as "business records" under 28 U.S.C. § 1732. This Court reversed a jury verdict for plaintiff on the

ground that admission of these documents without a proper foundation was prejudicial error. 251 F. 2d at 212, 216-17.

The facile notion that merely finding a document in the file drawer of a defendant qualifies it for admission without any other foundation was dismissed in the *Moore* decision. 251 F. 2d 215 n. 34. The Court's statement of the true requirements for admitting documentary evidence as "business records" pointedly exposes the flaws in appellants' mode of presentation at trial:

> "A memorandum or record cannot be considered as having been made in the 'regular course' of business * * * unless it was made by an authorized person, to record information known to him or supplied by another authorized person, * * * pursuant to established company procedures for the systematic or routine and timely making and preserving of company records." 251 F. 2d at 214-216.

The Court held also in *Moore* that, even with a proper foundation, evidence of extrajudicial acts or declarations by alleged co-conspirators, or their agents or employees, may not be considered against other alleged members of a conspiracy "unless there is independent evidence establishing *prima facie,* that such others were members of the conspiracy." 251 F. 2d at 210. Numerous documents offered by appellants in the present case and excluded by the trial court were barred by this rule, because they were not shown to emanate from any of the defendants against whom they were offered, or from any other person or entity with whom such defendants were shown *prima facie* to have conspired. This principle alone disposes of many of the objections now raised by appellants.

Similar principles are applied to testimonial evidence in *Flintkote Co. v. Lysfjord, supra.* The plaintiffs in that case were contractors who charged that Flintkote, a tile

supplier, and a number of their competitors had conspired to prevent them from obtaining acoustical tile.

This Court reversed a jury verdict for plaintiffs on the ground that the admission against Flintkote of certain testimony as to the acts or declarations of other alleged co-conspirators was prejudicial error because there was no *prima facie* showing of:

> "the prior existence of the conspiracy; who were its supposed members; how they supposedly operated; what their conspiratorial purpose was; and how they brought about their alleged purposes; and Flintkote's subsequent connection with it * * *" 246 F. 2d at 377.[10]

In *Flintkote* the Court further held that an alleged admission by a Flintkote employee was not admissible against Flintkote where there was no evidence that Flintkote had adopted or approved the statement, and the employee was a sales promotion man "who had no executive duties . . . but was a representative at the lower echelon." 246 F. 2d at 383-86.

To summarize, both the *Moore* and *Flintkote* decisions of this Court held that it was prejudicial error to *admit* evidence defective in precisely the same respects as much of that offered by appellants at trial and excluded. *A fortiori* the trial court's exclusions of such evidence cannot be the source of error or prejudice.

To these principles may be added the following which dispose of several other assignments of error by appellants:

1. The trial court has broad discretion in excluding evidence which is merely cumulative of that al-

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[10]The Court upheld the trial court's discretion to admit much of the evidence against Flintkote subject to later connection, but reversed for failure to strike the evidence on Flintkote's motion at the close of trial.

ready admitted; the erroneous exclusion of such evidence does not warrant reversal. *E.g., Lessig v. Tidewater Oil,* 327 F. 2d 459, 467 (9th Cir. 1964) *cert. den.* 377 U.S. 993 (1963); *Titanium Actynite Indus. v. McLennan,* 273 F. 2d 667, 673 (10th Cir. 1960).

2. The trial court does not err in excluding on one ground, evidence which is clearly inadmissible on another ground, whether or not such other ground was urged by counsel. *Los Angeles Trust Deed & Mort. Exch. v. SEC,* 285 F. 2d 162, 178 (9th Cir. 1960), *cert. denied* 366 U.S. 819 (1961).

3. Error of any kind in excluding evidence is not ground for reversal unless the appellant was substantially prejudiced by the ruling below. 28 U.S.C. § 2111; F.R.C.P. 61; *E.g., U.S. v. Borden Co.,* 347 U.S. 514, 516 n. 5, 98 L. Ed. 903, 907 (1954); *Cohen v. Cole Nat'l Corp.,* 336 F. 2d 58, 60 (1st Cir. 1964).

B. The Court Correctly Excluded Certain Documentary Evidence Offered by Appellants

1. Exh. Id. 5050

Exh. Id. 5050, on which appellants rely as "demonstrating" the use of a suggested retail price by Hotpoint Division of General Electric after 1958 (Br. Appel. 28, Spec. V-C-7) was properly excluded for lack of foundation. There is no basis in or outside of the record for the assertion in appellants' Specifications of Error that the document was "prepared by Hotpoint." Hotpoint's counsel made it clear at the trial that he had never seen the document before, knew nothing about its preparation, and did not know what it purported to say. The Court advised appellants' counsel that the document could not be introduced without proper foundation and left the door open for appellants to develop a foundation. This was never done. Tr. 5453-54.

There is nothing upon the face of the exhibit to suggest that it emanated from Hotpoint. Hotpoint's independent distributor, Graybar, employed suggested list prices at all relevant times. Tr. 3093. The San Francisco district of Graybar distributed not only in Northern California, but also in the Utah and Idaho locations apparently referred to on the Exhibit. See Exhs. 31-34. Exh. Id. 5050, if it does relate to Hotpoint products, appears to be a Graybar document.

2. Exhs. Id. 5052, 4196, 4931, 4266

Appellants contend that the court's exclusion of these exhibits was error, urging their materiality to show (a) Hotpoint's knowledge of "what these retailers were doing in the retail market", and (b) sales of Hotpoint brand merchandise to other "discount stores". Br. Appel. 93, 146; Spec. V-C-2, V-I-6c.

Exh. Id. 5052 (A and B) was the Graybar notification to GE-Hotpoint in November 1963 and January 1964 that Graybar had franchised White Front Stores in Oakland, San Francisco and San Jose. It was established by other evidence and not disputed that the Statistical Department of Hotpoint was routinely notified by its independent distributors, including Graybar, when new retail outlets were franchised. (See Exh. 536 concerning Graybar's appointment of Manfree; Exh. 4188-B concerning the Sterling appointment).

The decision of Hotpoint's independent distributor Graybar to franchise a particular retailer characterized by appellants as a "discount store" was immaterial and irrelevant to the issue whether Hotpoint had conspired with others to withhold its products from appellants. The evidence was uncontradicted that the franchising of retail outlets in San Francisco was exclusively the function of Graybar, the independent distributor, and that the de-

cision to terminate Manfree's franchise was taken solely by Graybar through its District Appliance Manager Mr. Mayben and his superior, Mr. Call. See Hotpoint-Graybar distributor agreements, Exhs. 31A-34B; Mayben at Tr. 3265-72.

Furthermore, Graybar's decision to franchise a so-called "discount store" other than appellants was already shown by Exhibit 482, showing that it franchised the GEM store in 1962. The Court was therefore correct in excluding Exh. Id. 5052 (A and B) as both immaterial and cumulative of other evidence in the record.

Exh. Id. 4196, a schedule of sales of Hotpoint brand products by White Front Stores in the Los Angeles area in 1957 and 1958, and in the Oakland-San Francisco area in 1963, was likewise properly excluded as immaterial and cumulative. The sales by White Front in Los Angeles were immaterial as they in no way related to the San Francisco market.[11] The fact that Graybar informed Hotpoint of unit sales to individual retailers in the San Francisco area was not disputed and established elsewhere in the record. See Exh. 4268.

Exh. Id. 4391 was properly excluded as it was immaterial, cumulative and without proper foundation. It is styled a "Refrigeration Department Marketing Representative Report" and appears to be a report by Mr. Vi Owen of Hotpoint of his "dealer contacts" in San Jose, San Francisco and Sacramento, noting that Hale's in San Francisco was "going great." So far as it tended to establish knowledge by Hotpoint of the performance of the retail dealers appointed by Graybar, Exh. Id. 4391 was cumulative of other evidence. See Exh. 4268. The same is true as to visits by Hotpoint representatives to retailers franchised by Graybar, Tr. 4229-30, or knowl-

[11]Moreover, Graybar had nothing to do with franchising retailers for Hotpoint products in Los Angeles.

edge by Hotpoint that Hale's had been franchised by Graybar. Exh. 638. The document was manifestly insufficient as it was offered without foundation in connection with the testimony of a Graybar witness (Mr. Mayben) who stated that he had never seen the document before and knew nothing about it. Tr. 3245-46.

Exh. Id. 4266, a summary of sales of Hotpoint brand products by Graybar to the GEM store in San Leandro in 1962 and 1963 was cumulative and immaterial. The Court had already admitted into evidence for what it was worth a September 5, 1962 letter by Mr. Mayben of Graybar, giving notice to Hotpoint of Mayben's decision to franchise GEM. Exh. 482.

3. Exh. Id. 548

Appellants urge error in the exclusion of Exh. Id. 548 (Br. Appel. 160; Spec. V-I-7) as evidence of refusal to deal. This October 30, 1961 demand letter to Graybar by Mr. Bernard Freeman of appellants was cumulative in that several demands by U.S.E. on Graybar and Hotpoint for products were already established. Exhs. 526, 538. The exhibit was hearsay as to Hotpoint.

4. Exhs. Id. 1184, 5090-5100

Error is asserted in the exclusion of this evidence purportedly establishing "special arrangements between appellees and the retail defendants" said to be "discriminatory" Br. Appel. 159; Spec. V-C-6.

Exh. Id. 1184 was excluded for irrelevancy and lack of foundation. Counsel for appellants admitted that the document came from the files of Hale's (Tr. 6250) but sought to introduce it against General Electric by questioning Mr. Bernard Meseth of GE as to whether it bore the signature of a Mr. Ray White, a General Electric employee. Mr. Meseth testified the signature was not Mr. White's, that he had no knowledge of the document, and that he

had never seen it before. Tr. 5332-5334. The document was clearly hearsay as to General Electric, and there was no proper foundation for its admission.

Exhs. Id. 5090-5100 were a group of General Electric advertising authorizations, some referring to "special" rates for special advertising promotions. The court correctly noted that these exhibits were merely cumulative of many others previously admitted unless appellants' counsel planned to show that the rates offered were in fact discriminatory; i.e., that they were not offered on an equal basis to all. Tr. 5360. The General Electric witness Meseth testified earlier that all General Electric advertising promotions were offered to all retailers on a proportionately equal basis. Tr. 5292-5296. On the representation of appellants' counsel that appellants would prove otherwise (Tr. 5361) the exhibits were marked for identification, but appellants' counsel never attempted thereafter to establish that any advertising program referred to in any of the exhibits under discussion had not in fact been offered by General Electric to all retail dealers on the same basis. Other exhibits in evidence (Exhs. 712, 713) showed similar "special" advertising promotions.

5. Exhs. Id. 5032, 5033, 5034, 5044, 5045, 5046 and 5047

Appellants assert at Spec. V-C-1 that the court erred in excluding these exhibits. Exhs. Id. 5032-5034 were 1963 inter-office correspondence of General Electric discussing the possible franchising of White Front Stores as a retail dealer for General Electric brand merchandise in Northern California. Exh. Id. 5044 was a 1965 document indicating that General Electric subsequently franchised White Front.

Far from evidencing any conspiracy by General Electric with other manufacturers, distributors or retailers to boycott appellants, these documents confirm that General

Electric selects its franchise dealers unilaterally in consideration of the ultimate objective of obtaining the best possible market penetration. The Court properly ruled that, absent any *prima facie* showing of a conspiracy with others, General Electric's thinking on franchising White Front Stores was its own business, and that the documents showed nothing material to an alleged conspiracy between General Electric and the other defendants in the case. Tr. 5253-5254.

Exhs. Id. 5032-5034 and 5044 were also cumulative. Meseth of General Electric testified that mass merchandising, as well as other types of retail outlets and business trends in general, were discussed within General Electric (Tr. 5262-5263), that the subject was not discussed with other manufacturers, distributors or retailers (Tr. 5264-5265), and that there is an element of risk any time an addition to dealer structure is made (*Ibid.*).

Exhs. Id. 5045-5047 are apparently breakdowns of brands of television and major household appliances carried by various retailers in the San Francisco area. They were properly excluded for lack of foundation, immateriality and lack of relevance. Tr. 5268. They were offered through Mr. Meseth, who testified that he was employed in Sacramento at the time one of the documents was dated ("8-26-63") and that he had never seen them before. Tr. 5266. The only foundation offered for the documents was counsel's statement that they were "from the files of General Electric Company". *Ibid.*

The exclusion of these exhibits in no way prejudiced appellants, for they never contended that General Electric had conspired in any way with other "mass merchandisers." Observation visits by General Electric representatives to the premises of such merchandisers, if proved, would show nothing more than GE's unilateral interest in apprising itself of market trends.

6. Exh. Id. 431

Appellants rely frequently upon Exh. Id. 431, which appears as Appendix B to their brief, in support of their contention that "joint and collaborative action among the appellee and co-conspirator manufacturers * * * [was] clearly established by substantial evidence." The finder of fact is asked to infer that such collaboration had an unlawful purpose and in some way relates to this case. See, for example, Br. Appel. 71, 73, 165.

Exhibit 431, an unsigned, undated document attached to a letter and styled "Executive Management Responsibilities in Marketing Practices", is a discussion of certain pricing and advertising practices and an outline for providing equal price and advertising terms to all in accordance with the Robinson-Patman Act. It certainly is not evidence of any conspiracy to boycott appellants in particular, or "discount houses", in general.

The foundation for the document was totally insufficient. It was hearsay as to General Electric. The only information about its origin was that it came from the files of Norge Sales Corporation, a party no longer in the case. Neither (a) the author of the memorandum; (b) his employer; (c) the circumstances surrounding its preparation; nor (d) the persons who received it were ever established. Appellants' counsel did not establish that General Electric had any knowledge whatsoever of this document.

7. Exhs. Id. 2093-2095, 2097, 3002, 3003, 3007, 3010, 3022, 3024, 3025, 3026, 3029, 3036, 3037

Most of these exhibits relate to the National Electrical Manufacturers Association (NEMA) and the American Home Laundry Manufacturers Association (AHLMA). The claims of error in their exclusion appear at Spec. V-I-11 through 15.

The above documents were all properly excluded, because they were hearsay as to General Electric, lacking in proper foundation, and devoid of any probative value in support of the alleged conspiracy to "boycott" Manfree.

8. Accountant's studies of appellants (Exhs. Id. 1491, 1492, 1500, 1560, 1561-1578, 1579-1681, 4334, 4335, 4336, 4337, 4339, 4340)

The trial court excluded numerous studies prepared by appellants' accountants. See Br. Appel. 166-168; Spec. V-I-16 through 20. *Voir dire* examination of the authenticating witness revealed that he had not done the work personally (Tr. 6306), that the exhibits were prepared from records of parties not before the court (Tr. 6311-13), that they were based on mistaken assumptions (revealed only to the extent of the witness' limited knowledge of their manner of preparation), and that they did not distinguish between San Francisco operations and out-of-city operations for retailers having branches both within and without the city. See generally Tr. 6319-6401.

Some of the documents purported to show that distributors' suggested list prices and retailers' "tag prices" were identical, but the witness confirmed that he did not know the prices at which merchandise was tagged (Tr. 6383), or sold. Tr. 6387. Other schedules attempted to establish "discriminatory" variances in General Electric's prices to retailers, yet the witness admitted that the person preparing the exhibits did not know the prices at which merchandise was actually billed by General Electric. Tr. 6388, 6395.[13] The witness did not know that certain volume allowances referred to in the exhibits were standard allowances offered by General Electric to all retailers on volume purchases. Tr. 6392. The person

[13]The schedules apparently were prepared from retailer records not in evidence containing purchase orders, as compared to supplier invoices.

preparing the schedules could not determine whether a particular purchase order was in fact part of a larger shipment entitling the retailer to a standard volume discount on a carload shipment. Tr. 6392-93. Nor were price variations of General Electric products for different colors of merchandise taken into account, even though these variations appeared on General Electric price sheets and applied equally to all customers. Tr. 6389-91. The exhibits therefore presented a distorted, inaccurate and entirely false picture, which required their exclusion. Tr. 6401.

9. Exhs. Id. 5117 and 5118

These exhibits allegedly excluded in error (Br. Appel. 163-64; Spec. V-I-8) showed purchases of General Electric small appliances by Camrose, a separate concessionaire in the U.S.E. store. They were not designated in appellants' required pretrial lists. Furthermore, the evidence showed that General Electric brand small appliances (such as irons, toasters, etc.) were distributed on an independent basis by the General Electric Supply Company, an entirely separate division of General Electric with headquarters in San Francisco. Tr. 4187, 5291. Testimony by Messrs. Gough and Meseth established that the marketing considerations involved in the distribution of small appliances are substantially different from those in the distribution of major household appliances. Tr. 4196-98, 5292. The Court properly excluded all evidence of the Camrose purchases of small appliances on the grounds that it was irrelevant, lacking in foundation and immaterial. Tr. 6599-6601. The exclusion was in no way prejudicial.

C. The Court's Rulings in Connection with Testimonial Evidence Were Proper

1. Limitation of Mr. Vern Brown's Testimony and Exclusion of Certain Exhibits Offered Therewith

Mr. Vern A. Brown was a former Graybar Employee and a resident of the San Francisco Bay Area whose name and title (District Appliance Manager) appeared on a number of documents furnished to the appellants during pretrial discovery. Mr. Brown's deposition was not taken, he was not subpoenaed until after the beginning of the trial, and his own testimony was that appellants' counsel first contacted him ten days prior to his appearance in court. Tr. 6083. Appellants now claim that the trial court committed prejudicial error in limiting Mr. Brown's testimony. Spec. V-C-3 and 4.

Mr. Brown was not named on the list of witnesses filed by appellant on July 19, 1965 pursuant to paragraph 11 of the Court's pretrial order (R. 1472) and Local District Court Rule No. 4 (11), which requires:

> "A list of all witnesses, expert or otherwise, expected to testify at the trial, except those to be used for impeachment only, classified as far as practicable, according to the issue and general subject matter of their testimony, * * *"

Mr. Brown's name did appear on a list of *documents* intended to be offered at trial which appellant filed pursuant to Local Rule No. 4 (10). See R. 1534. In designating price sheets to be offered as exhibits by appellants that list states:

Witnesses expected to testify are:
Graybar & Hotpoint Price Sheets—
Mr. W. Mayben, Jr., Vern Brown, W. Wichman

On November 4, 1965, appellants' counsel produced Mr. Brown and announced that he would testify, not as

an identifying witness for the Graybar and Hotpoint Price sheets, but to Graybar's merchandising policies at various times, to asserted changes in such policies, and the reasons therefor. At no time did counsel vouchsafe any excuse for not giving the required notice that Brown would testify on matters of substance, electing instead to rely on the specious proposition that naming Brown as an identifying witness on appellants' pretrial list of documentary exhibits afforded defendants and the court sufficient notice of the nature and importance of his testimony. Tr. 6065-6070.

The trial court's ruling was a proper exercise of discretion. The salutary purposes of pretrial discovery and the careful charting of the trial by pretrial order in complex, protracted litigation such as this case would be thwarted if the requirements for advance listing of witnesses and notice of their testimony could be so lightly disregarded or artfully evaded.

The decisions of other federal courts fully support the ruling below. *E.g., Heilig v. Studebaker Corp.,* 347 F. 2d 686, 690 (10th Cir. 1965); *Payne v. S. S. Nabob,* 302 F. 2d 803 (3rd Cir. 1962). A case strikingly similar to this one is *Thompson v. Calmar S. S. Corp.,* 216 F. Supp. 234, 240 (E.D. Pa. 1963) *aff'd* 331 F. 2d 657 (3rd Cir. 1964). In that action by an injured stevedore against a steamship company the trial court gave the defendant leave to amend its pretrial list of witnesses by adding the names of its experts. Defendant then added the name of a certain witness, which "clearly implied that he was to be an expert witness." 331 F. 2d at 662. At the trial defendant sought to have the witness testify on certain factual matters and to the claimed *res gestae* utterance of another longshoreman. The trial court held (in language adopted by the Third Circuit) that it would be "wholly contrary to the spirit of our Rules and destructive of

orderly procedure . . ." to permit the testimony. 216 F. Supp. at 240; 331 F. 2d at 662.

Here, as in the *Thompson* case, the offering party knew of the witness long before trial and the adversary was completely surprised by an offer of testimony radically different from that for which the witness had been designated—if, indeed, he can be said in this case to have been designated at all.

The exhibits offered in connection with the Brown testimony (Exhs. Id. 5112 and 5113) were clearly hearsay as to Hotpoint and were not identified *on any of appellants' pretrial lists,* a circumstance which clearly called for their exclusion. *Globe Cereal Mills v. Scrivener,* 240 F. 2d 330, 335 (10th Cir. 1956); *Hoeppner Constr. Co. v. U. S.,* 287 F. 2d 108, 112 (8th Cir. 1961).

The court properly ruled that Brown's testimony concerning a meeting attended by Mayben of Graybar was obvious hearsay as to Hotpoint-General Electric, where Brown could not recall whether a Hotpoint representative was present. Tr. 6122-23.

2. The Ruling that Mr. William Lau Was Not an Adverse Witness

The trial court correctly held that Mr. William Lau, a sales counselor for General Electric from 1955 to 1963, was not an adverse witness at the time of the trial under Federal Rule of Civil Procedure 43 (b). Tr. 4326-29. At that time the witness was employed by Magnavox Corporation, a competitor of General Electric, which was not named as a defendant or co-conspirator or in any way involved in any of the events in suit. Lau, a salesman who had no executive or supervisorial duties when he was with GE, had neither the requisite degree of authority and discretion in dealing with General Electric's interests, nor any personal alignment with those interests.

Therefore he was not a "managing agent" of GE. See *Brandon v. Art Centre Hospital,* 366 F. 2d 369, 372 (6th Cir. 1966); *Skogen v. Dow Chem. Corp.,* 375 F. 2d 692, 701 (8th Cir. 1967); *Cf. Flintkote Co. v. Lysfjord, supra,* 246 F. 2d at 384-85. Moreover, the ruling was not prejudicial, for appellants were given ample latitude for attempted impeachment of Mr. Lau. See Tr. 4333-42.

3. Exclusion of Bernard Freeman's Testimony As to Statements by Ray White of General Electric

The claim is made that the testimony of Mr. Bernard Freeman of appellants to a conversation with a General Electric salesman, Mr. Ray White, was improperly excluded. Spec. V-C-5. The record establishes that at the time of the alleged conversation, Mr. White was a General Electric salesman whose sales jurisdiction did not include appellants' store and who had no authority to deal with plaintiff in any way, let alone to speak for General Electric as to whether U.S.E. would get a franchise. Tr. 4393, 5832-35, 5867-68. The foundation for the alleged statements by White was therefore insufficient, and the court's ruling was correct. See discussion of *Flintkote Co. v. Lysfjord, supra,* at pp. 35-36.

4. Exclusion of Evidence Concerning the Prior Action by Klor's, Inc. Against General Electric and Others

Appellants assert error in the exclusion of evidence pertaining to a prior lawsuit conducted by appellants' counsel against General Electric and others on behalf of Klor's, Inc., a former San Francisco retailer. Br. Appel. 168-69; Spec. V-I-21 and 22. That action (Civ. No. 35,274) went to trial against General Electric alone in the United States District Court in San Francisco before the late Judge Louis Goodman and resulted in a judgment for General Electric upon a directed verdict granted by Judge

Goodman on January 24, 1961, for insufficiency of the evidence to establish participation by General Electric in any agreement or conspiracy to boycott Klor's.

Appellants' counsel made an offer of proof concerning the Klor's lawsuit in conjunction with the testimony by Mr. Meseth of General Electric. Tr. 5313-19. The sum and substance of the offer was that between 1953 and 1956 Meseth was then a General Electric salesman, that Hale's outlet on Mission Street in the vicinity of Klor's was franchised for General Electric major appliances, and that Meseth had a conversation with Mr. Klor sometime before 1956, wherein Mr. Klor requested major appliances, and was advised by Meseth that General Electric would not franchise Klor's for appliances because of information that Klor's was in serious financial difficulties. Klor advised Meseth that he was attempting to get new capital.

Appellants later sought to call as a witness Mr. Samuel Frachtenberg, a former shareholder in Klor's not listed as a witness. The trial court's refusal to admit the Frachtenberg testimony was a sound exercise of discretion. The court correctly noted that the proposed testimony of Frachtenberg was "not impeachment testimony in any form or character." Tr. 5683. The failure to list Frachtenberg as a witness before trial fully justified the rejection of his testimony (see cases cited in the discussion *supra* at pp. 47-48 of the Brown testimony), particularly as appellants' counsel already had been given much latitude in seeking to retry issues which had been finally adjudicated in the prior action by Klor's.

In any event, the proffered testimony concerning Klor's was properly rejected for immateriality. The refusal of a General Electric appliance franchise to Klor between 1953 and 1956 because of Klor's financial difficulties was utterly without relevance to the instant action.

5. Exclusion of Portions of Mr. Arthur Alpine's Deposition

Mr. Alpine's statements at his deposition giving his version of conversations with Mr. Meseth of General Electric and with an unidentified Graybar representative at about the time Graybar cancelled Manfree's Hotpoint franchise were plainly inadmissible, appellants' claim of error (Br. Appel. 155-56; Spec. V-H-a, f) notwithstanding. Mr. Alpine testified unequivocally that he prepared memoranda of each of these conversations and transmitted them to U.S.E.'s counsel. Dep. Tr. 177, 250. Yet he repeatedly refused, upon the advice of counsel, either to produce the memoranda for inspection by appellees' counsel or to answer questions concerning them. Dep. Tr. 250-52. The trial court's decision to exclude those portions of the deposition as to which appellees were denied the right to cross-examine Mr. Alpine effectively by the withholding of the memoranda until after his death was required in the interests of justice and is fully justified by authority. See F.R.C.P. 26 (c); *DuBeau v. Smither & Mayton, Inc.*, 203 F. 2d 395, 396-97 (D.C. Cir. 1953); *Continental Can Co. v. Crown Cork & Seal, Inc.*, 39 F.R.D. 354, 356 (E.D. Pa. 1965); cf. *Lipscomb v. Groves*, 187 F. 2d 40, 44 (3d Cir. 1951). Any other result would have rewarded the withholding of the memoranda (which the trial court later ordered produced on motion) and penalized appellees for a delay of which they were in no way the cause.

III. THE TRIAL COURT'S RULINGS ON DISCOVERY WERE PROPER AND NO PREJUDICE CAN BE SHOWN FROM SUCH RULINGS

A. Item 15 of June 2, 1964 Motion and Item 20 of November 1964 Motion under F.R.C.P. 34.

Appellants claim prejudice because "definitive orders were not granted allowing the production of all intra-

office correspondence regarding [appellants'] requests for product.'' Br. Appel. 173.

Nothing of the sort occurred. In their June 1964 motion directed to factory defendants appellants sought production in item 15 of:

> ''all intra-office reports, memoranda or notes pertaining or relating to the plaintiffs above named or the retail defendants above named during the above period of time''.

This call for production was denied for the obvious reason (among others) that the description was wholly lacking in the requisite definition or particularity of subject matter. The court did require production under the June 1964 motion of any correspondence or memorandum exchanged by General Electric with any remaining defendant pertaining either to appellants or to any so-called discount store or business operated in a manner similar to plaintiffs (Item 12, R. 673).

In November 1964 the court required production under Item 20 of all letters from appellants received by General Electric on which there were contained any notes, memoranda or inter-office communication relating to such requests, and such were produced. The letters of appellants which were not marked with General Electric notes were not required to be produced, for the obvious reason of lack of good cause. The implication in appellants' brief (p. 175) that Item 20 of the November 1964 motion directed to the factory defendants was not allowed is incorrect. See R. 1057, 1063.

B. The court's rulings concerning Items 22c, d, e and Item 27f, of the November 1964 motion were correct; so far as relevant the documents had already been produced or else did not exist.

Item 22c sought letters exchanged between factory and local distribution relating to preventing the plaintiff from

acquiring product from other sources or distributors. This type of material had already been requested from General Electric as a factory defendant and allowed by the court in the June motion, pursuant to items 12, 18 and 23 thereof. R. 673, 680-681.

Item 22d of the November motion called for letters exchanged between factory and local distribution concerning conversations or statements made by any representative of retail dealers on pricing, advertising and similar matters. These items are substantially those required and allowed by the court under items 11, 18 and 19 of the June motion. R. 673, 680-681. It was established by both General Electric responses to interrogatories (namely the responses to appellants' last set of interrogatories numbers 4 and 5, R. 1238) as well as the supporting affidavits filed in connection with hearings concerning the motions to produce, that no such materials existed other than those produced. See affidavits of Segerson, R. 520-521; McAlpin, R. 514-16. No prejudice can be shown from the court's ruling on item 22d, in view of the repetitive nature of the demand and the failure of appellants to establish that any such documents existed other than those already produced.

Item 22e requested production of correspondence concerning the sale or possibility of sale to certain retail outlets of the so called "mass merchandiser" variety. Item 12 of the June motion allowed by the court had required production of all correspondence or memoranda kept by General Electric referring to any so called discount house or business operated in a manner substantially similar thereto. R. 673, 680.

Item 27f sought to require factory defendants to produce letters or notes of minutes found in the company files of representatives who "attended associations", pertaining to NEMA, EIA, GAMA and AHLMA, and

discount department stores or mass merchandising stores. Under item 23 of the June motion General Electric had been required to produce all "notes" or "memoranda" pertaining to sales to discount or mass merchandisers. It had also been required to produce under item 12 thereof any correspondence kept by it concerning discount stores or businesses similarly operated. R. 673, 680. Appellants had access to the minutes of said organizations through depositions of their custodians of records. As established by the affidavits of Segerson and McAlpin (R. 514, 520), General Electric had no notes, reports or minutes relating to any meetings with any other factory defendants concerning mass merchandising or discount stores. No prejudice can be shown to appellants from the court's ruling in regard to item 27f.

C. Rulings on Interrogatories

Appellants claim error in the court's ruling in regard to their interrogatory No. 2 filed September 29, 1964 (Br. Appel. 174) inquiring as to the existence of any report reflecting a conversation between General Electric and any person having to do with the buying, selling or advertising of products either by appellants or by any retail defendant.

The court properly sustained objection to this ill defined request. Appellants had covered substantially the same ground in their various motions to produce. See Items 11, 12, 18, 19 and 23 of their June 1964 motion for production addressed to factory defendants, R. 424-25, and the order of the court granting these requests. R. 673. The subject was also treated in depositions of General Electric witnesses. E.g., Wichman at Dep. Tr. 38, 148, 157; Lau at Dep. Tr. 29; Meseth at Dep. Tr. 103. Subsequently appellants served their second set of interroga-

tories, to which General Electric filed its responses of May 28, 1965 which established that no statement, memorandum or report existed which reflected any conversation between any representative of General Electric with another representative, or between General Electric and another defendant, in which appellants were in any way mentioned, and that there were no writings reflecting a conversation between General Electric representatives, or between a General Electric representative and a representative of another defendant with respect to any agreement, understanding or policy, stated or suggested, concerning retail pricing, terms and conditions, at which products were sold, shown for sale, or advertised by retail defendants, which had not been produced theretofore in the action. R. 1238.

Appellants also challenge the court's ruling sustaining objection to their interrogatory seeking information as to conversations between General Electric attorneys and representatives of other defendants in which the plaintiffs were mentioned, expressly or by implication. (R. 792-93, No. 3 of plaintiffs' second interrogatories). This interrogatory plainly attempted to delve into the work product of General Electric's attorneys, an excursion for which no showing of cause was offered. The interrogatory was wholly improper, seeking without justification "to pry into and discover the results of conferences and communications between counsel for and agents of a party, or parties similarly situated, after the institution of suit and in preparation for trial."

> *Byers Theaters v. Murphy,* 1 F.R.D. 286, 289 (W.D.Va. 1940).

See also

> *Transmirra Products Corp. v. Monsanto Chemical Co.,* 26 F.R.D. 572 (S.D. New York 1960).

CONCLUSION

Upon the basis of the foregoing authorities appellee General Electric Company respectfully submits that the judgment of the District Court directing a verdict in favor of said appellee and dismissing the complaint against it should in all respects be affirmed.

San Francisco, California,
April 24, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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